

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

The Petition of the State of Minnesota Acting by
and Through the Minnesota Department of Transportation
and the Minnesota Department of Administration, for a
Declaratory Ruling Regarding the Effect of Sections
253(a), (b) and (c) of the Telecommunications Act of
1996 on an Agreement to Install Fiber Optic Wholesale
Transport Capacity in State Freeway Rights-of-Way

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 98-1

Opposition of
the New York State Telecommunications Association, Inc.

In response to the January 9 and February 6, 1998 Public Notices issued by the Federal Communications Commission ("Commission") in the above-captioned matter,¹ the New York State Telecommunications Association, Inc. ("NYSTA") hereby files this opposition to the request for Declaratory Ruling filed by the State of Minnesota ("Minnesota").² As indicated herein, NYSTA submits that the Petition should be denied, and that, pursuant to Section 253(d) of the Communications Act of 1934, as amended (the "Act"),³ the Commission should preempt

¹ Public Notice, CC Docket No. 98-1, DA 98-32, released January 9, 1998; Public Notice, CC Docket No. 98-1, DA 98-236, released February 6, 1998.

² See Petition for Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, dated December 30, 1997 ("Petition").

³ Section 253(d) states that

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

the exclusive rights-of-way ("ROW") arrangement granted by Minnesota to ICS/UCN LLC (the "Developer") and Stone & Webster Engineering Corporation. In support thereof, the following is shown:

NYSTA is a trade association representing, among others, the interests of forty (40) incumbent local telephone companies operating within the State of New York. NYSTA's members rely upon the availability of ROWs to construct, maintain, and operate their facilities-based networks which provide services to virtually all areas of the State of New York. NYSTA is concerned that the Minnesota/Developer relationship will be used as a model in other jurisdictions with the result of effectively precluding access to ROWs that are necessary to foster the further deployment of infrastructure and services to end users. In fact, NYSTA expects that similar issues may arise in New York in the near future.

NYSTA supports the position taken by the Minnesota Telephone Association ("MTA") that the effect of the Minnesota exclusive contract with the Developer will create a meaningful foreclosure for other carriers to access the subject ROWs.⁴ It is self-evident that access to ROWs are an integral component of planning, constructing, and maintaining the facilities-based networks required to provide services to all end users. Inhibiting access to ROWs through exclusive arrangements frustrates both the development of such networks and the provision of services that could be provided to end users over those networks. Contrary to the position taken by Minnesota, the alternatives available to carriers other than the Developer do not make the

⁴ Petition, Exhibit 3, November 26, 1997 Letter to Scott Wilensky, Assistant Attorney General, from Richard J. Johnson, Counsel to the MTA ("MTA Position").

fiber optic facilities "functionally non-exclusive."⁵ The options in the Minnesota/Developer agreement -- a one time option to construct facilities, or (2) lease arrangements based on the Developer's "market rates"⁶ -- do not cure the exclusive nature of the agreement. Carriers are still prevented from deploying network in the subject ROWs in the future. Accordingly, the MTA is correct that the arrangement established between Minnesota and the Developer has "the effect of prohibiting the ability of any entity to provide interstate and intrastate telecommunications service"⁷ and should be preempted.

NYSTA is fully aware of, and shares concerns for, safety in the construction of any facilities.⁸ However, the Petition also demonstrates that Minnesota has contracted for an economic benefit derived from the exclusive ROW arrangement, i.e., the dedication of capacity to Minnesota once the fiber facilities are constructed.⁹ Thus, NYSTA agrees with the MTA¹⁰ that the grant of the exclusive ROW is neither competitively neutral nor nondiscriminatory, and not otherwise within the State's right to manage ROWs.¹¹

⁵ Id. at 10 (emphasis in original).

⁶ See, e.g., id. at 10, 18.

⁷ 47 U.S.C. § 253(a); see also 47 U.S.C. § 253(d).

⁸ See, e.g., Petition at 28.

⁹ See id., Exhibit 3/MTA Position at 13; see also id., Exhibit 5 at III-4.

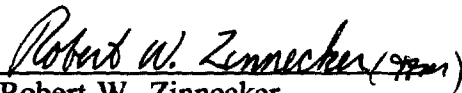
¹⁰ See id., Exhibit 3/MTA Position at 9-14.

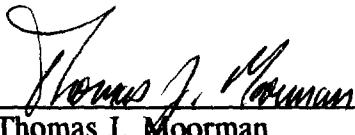
¹¹ See 47 U.S.C. §§ 253(b) and (c). NYSTA also agrees with the MTA that construction in a ROW associated with a limited access free-way is less expensive than constructing in ROWs not associated with a limited access free-way, thus providing a benefit to the Developer that is not competitively neutral. See id., Exhibit 3/MTA Position at 6-7.

Based on the Petition, NYSTA submits that the exclusive ROW arrangement between Minnesota and the Developer cannot withstand the scrutiny required under Section 253 of the Act. Accordingly, NYSTA supports MTA's request that Commission preempt the Minnesota/Developer contract pursuant to Section 253(d) of the Act.

Respectfully submitted,

**The New York State
Telecommunications Association, Inc.**

By: 
Robert W. Zinnecker
President
New York State Telecommunications
Association, Inc.
100 State Street, Room 650
Albany, New York 12207
(518) 443-2700


Thomas J. Moorman
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037
(202) 296-8890

March 9, 1998

CERTIFICATE OF SERVICE

I, Colleen von Hollen, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that on this 9th day of March, 1998, a copy of the foregoing Opposition of the New York State Telecommunications Association, Inc. was hand-delivered to the following:


Colleen von Hollen

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 544
Washington, DC 20554

A. Richard Metzger, Acting Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20554

ITS, Inc.
1919 M Street, NW, Room 246
Washington, DC 20554

Scott Wilensky, Esq. *
Assistant Attorney General
Office of Attorney General
445 Minnesota Street
St. Paul, MN 55101-2130

* Via Overnight Delivery